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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 991

ALFONSO SPINELLI,
Libellant-Petitioner,

—against—

ISTHMIAN STEAMSHIP COMPANY, a corporation,
Respondent,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. _____

ALFONSO SPINELLI,

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ISTHMIAN STEAMSHIP COMPANY, a corporation,

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INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Alfonso Spinelli, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled matter.

The Opinions of the Courts Below

The opinion of Judge EDWARD C. MCLEAN, dismissing the libel (15a) is printed in the Appellant's Appendix in the Court below, and is unreported.

The opinion of the Court of Appeals for the Second Circuit, printed as Appendix A hereto, is reported in 326 F. 2d 870.

Jurisdiction

The decision and judgment of the Court of Appeals for the Second Circuit, sought to be reviewed, printed as Appendix B hereto was decided and entered on January 13, 1964.

The jurisdiction of this Court is found in 28 U. S. Code, Sections 1254(1) and 2101(c).

Questions Presented

1. Whether or not an unseaworthy condition for which a ship owner is held liable may be created by longshoremen in the performance of ship's work and in their method of operation.

2. Whether or not a vessel or any part thereof, including a draft, which is in an overloaded condition so as to be unsafe, is unseaworthy.

Statement of the Case

This action was brought to recover damages for injuries sustained on September 17, 1957 by the libellant, a longshoreman employee of International Terminal Operating Co. (ITO), which was engaged in loading cargo aboard the defendant's vessel, the SS STEELMAKER at Shed No. 4, Erie Basin Terminal, Brooklyn, New York (4a). He worked on the stringpiece alongside the vessel (4a). The cargo at the time consisted of steel pipes (10a). The trial court described the accident (15a):

> . . . . A draft of steel pipe which was being hoisted in a sling from the dock to the vessel fell back to the dock and struck libellant, injuring his foot. The draft

fell back because the brake on the ship's winch slipped . . . ."

The court found that in accordance with normal practice the brakes on the winch was set to hold three tons (17a). This setting was fixed and checked by the ship's electrician (16a). The loading of pipes had started at about 7:00 p.m. on the evening of the accident (17a). The trial court found further (18a):

> "Along about 10:00 P.M. the gang began to load the shorter pipes. At first they put six or seven pipes in each draft. These were hoisted and stowed away without incident. At about 10:45 P.M. the dock foreman, Tony the Gump, told the dock gang to put nine pipes in each draft. Libellant and other longshoremen protested, saying that they feared that to do so would over load the winch. Tony the Gump explained that he was the boss and that he expected his orders to be obeyed. Libellant and the others complied.
>
> "Two drafts of nine pipes each were thereafter pulled up without mishap. Then came a third draft. It was hoisted to a height of 3 or 4 feet above the dock, where it paused. This was normal, as it was the practice to hold each at this height momentarily to stop any swaying. This particular draft did not continue on its upward way, but immediately after the pause the front end of the draft came back down to the dock. The sling on the front end opened up when it hit the dock and one of the pipes came out and struck libellant on his left foot."

In reviewing the physical facts concerning the drafts lifted the court concluded (22a):

"* * *. A draft of seven of the shorter pipes is clearly within the capacity of the equipment and a draft of nine of the shorter pipes is clearly beyond it."

In dismissing the libel the court stated (23a):

"* * *. The most probable explanation of this accident is that the slipping was caused by overloading a winch which was in a sound condition, reasonably fit for its intended use, and which would not have failed if it had been properly used. This is the explanation which I adopt * * *."

In applying the law to the facts in this case, the court stated that ITO alone was negligent and its negligence was the sole cause of the injury to plaintiff (25a). As to unseaworthiness the court concluded (25a):

"The ship was not unseaworthy. On this point I may say that I do not believe that the cases have as yet reached the point of holding that a vessel is unseaworthy merely because one of its appliances fails when it is used by a stevedore in a manner for which it was not designed or intended. I do not understand that *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423 (1959), relied upon by libellant so holds. In that case, the negligent operation of the stevedore 'did no more than bring into play the unseaworthy condition of the vessel' which had previously existed. Here there was no such previously existing unseaworthy condition."

On appeal to the Court of Appeals for the Second Circuit, the decree was affirmed.

Reasons for Allowance of the Writ

The decision of the Court of Appeals for the Second Circuit is erroneous and is not in accord with the decisions of this Court in *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 413 (1959) and *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 80 S. Ct. 924, 4 L. Ed. 2d 941 (1960).

In the case of *Crumady* v. *The Joachim Hendrick Fisser*, *supra*, this Court held a vessel liable and granted indemnity over where a longshoreman was injured. A boom fell while a load of lumber was being lifted out of a hold. The ship's equipment was specifically found to be "in good condition". However, the cut-off device on the rigging had been adjusted. The stevedoring company overloaded the boom, causing "the unseaworthy condition of the vessel" to come into play. The vessel was allowed to recover over. It is to be noted that if the stevedoring company had not been negligent, i.e., had not overloaded the boom, the vessel's equipment would have been safe for use.

In the present case also, the accident occurred when the stevedoring company overloaded the winch as a result of which the vessel's winch did not function properly. The Court below found (23a):

> "* * * The most probable explanation of this accident is that the slipping was caused by overloading a winch which was in a sound condition, reasonably fit for its intended use, and which would not have failed if it had been properly used. This is the explanation I adopt * * *"

The trial court found that the brakes on the winch were set by the ship's electrician (16a). Libellant's gang started to work at 7:00 P.M. (17a). At about 10:45 P.M., the J.T.O. foreman ordered the men to increase the load to nine pipes

(18a). Two drafts of nine pipes were pulled up without incident. As the third draft was being raised, the brakes on the winch slipped and the draft fell back, causing plaintiff's injury (18a). The Court specifically found that the "winch was overloaded because the I.T.O. foreman insisted that nine pipes be placed in the draft" (24a). The condition, therefore, was not a momentary or fleeting one.

In the case of *Grillea* v. *United States*, 232 F. 2d 919 (2 Cir. 1956), the Court distinguished a fleeting condition which arises simultaneously with a negligent act and is part of it, from a condition which exists as a separate state for even a relatively short time on a vessel. It is not the time that the condition exists which is the significant factor; it is the distinct status of the condition.

Judge LEARNED HAND discussed the distinction at page 922:

> "* * * However, it is at times hard to say whether a defect in hull or gear that arises as a momentary step or phase in the progress of work on board should be considered as an incident in a continuous course of operation, which will fasten liability upon the owner only in case it is negligent, or as an unfitness of the ship that makes her *pro tanto* unseaworthy. The respondents plausibly argue, for instance, that when a strongback is dislodged by the negligence of a winchman, or of those who direct him, or when some one of the crew carelessly turns a lever that drops a boat from its davits, there is a moment, however, short, during which the ship is unfit and during which her unfitness causes the injury; yet on such occasions she is not deemed unseaworthy. On the other hand, if the wrong hatch cover had been placed over the 'pad-eye' the day before the libellant stepped on it, this ship would have been unseaworthy;"

Since the *Grillea* decision, this Court has stated definatively that since notice is not a factor in fixing liability for unseaworthiness, the time during which a defective condition exists does not control the issue in any way.

In *Mitchell* v. *Trawler Racer, Inc., supra*, Mr. Justice STEWART reviewed the nature of a shipowner's duty to provide a seaworthy vessel. He stated at page 549:

> "There is no suggestion in any of the decisions that the duty is less onerous with respect to an unseaworthy condition arising after the vessel leaves her home port, or that the duty is any less with respect to an unseaworthy condition which may be only temporary. Of particular relevance here is Alaska Steamship Co. v. Petterson, supra. In that case the Court affirmed a judgment holding the shipowner liable for injuries caused by defective equipment temporarily brought on board by an independent contractor over which the owner had no control. That decision is thus specific authority for the proposition that the shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability. *That decision also effectively disposes of the suggestion that liability for a temporary unseaworthy condition is different from the liability that attaches when the condition is permanent.*" (Italics ours.)

If a longshoreman's injury is caused as a result of cargo improperly stacked by longshoremen in a hold, there would be no difficulty in finding that an unseaworthy condition existed on the vessel. In *Morales* v. *City of Galveston, Texas*, 370 U. S. 165, 82 S. Ct. 1226, 8 L. Ed. 2d 1226 (1962), Mr. Justice STEWART commented at page 170:

> "A vessel's unseaworthiness might arise from any number of individualized circumstances. Her gear might be defective, her appurtenances in disrepair, her

crew unfit. *The method of loading her cargo, or the manner of its stowage, might be improper.* * * *. For any or all of these reasons, or others, a vessel might not be reasonably fit for her intended service. * * *" (Italics ours.)

Paliaga v. *Luckenbach Steamship Company*, 301 F. 2d 403 (2 Cir. 1962) is significant. In that case a longshoreman brought an action based on both negligence and unseaworthiness. He was injured when a ninety pound carton of petroleum wax fell from a draft which was being lowered into a tank with the ship's boom and winches. At the close of all the evidence the District Court dismissed the negligence claim of the plaintiff and submitted the issue of unseaworthiness to the jury on whether the vessel "was unseaworthy because there had been a failure to secure the loose carton or a failure to use a circular pallet instead of a rectangular one in the draft." The third party stevedore settled with the plaintiff before the jury came in with a verdict. The Court refused to permit the shipowner to pursue its action over following the settlement. On appeal this was reversed. However, in discussing the applicable law, Judge WATERMAN stated at page 409:

"* * * But the question of the unseaworthiness of the S.S. Edward Luckenbach was under consideration by the jury at the time of the announced settlement, and *we are told that a stevedore's breach may create the unseaworthiness of a ship or* the breach may activate a ship's pre-existing unseaworthy condition, and *in either case* as a result of the stevedore's operations the likelihood exists of the shipowner's liability to persons who stand in the shoes of seamen. Crumady v. The Joachim Hendrick Fisser, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413 (1959) * * *." (Italics ours.)

In the case of *Rich* v. *Ellerman & Bucknall S.S. Co.*, 278 F. 2d 704 (2 Cir. 1960), the plaintiff longshoreman was injured when a chassis stowed on the vessel tilted when he stepped on it. The charge of the trial court was held to be in error and a verdict for the defendant was reversed on appeal. Among other things, Judge SMITH stated at 707:

> "* * * Moreover, the portion of the charge which was intended to apply to the unseaworthiness claim may well have been understood to have been limited to structural defects in hull or gear. This was not sufficient under the circumstances here, for *the unseaworthiness claimed was the dangerous working platform consisting of the chassis in the condition in which they were left by Clark's men sometime before noon. A ship may* be unseaworthy because of improper stowage * * *." (Italics ours.)

The concept of "unseaworthiness" relates to a condition existing in or on a vessel. It is not limited to the mechanical state of specific items of ship's equipment. It relates as much to a condition created by the improper use of good equipment as it does to a condition created by mechanically defective equipment properly used. Cf. *Vega* v. *The Malula*, 291 F. 2d 415 (5 Cir. 1961). For example, a vessel, otherwise adequate, which is improperly loaded has traditionally been regarded as being unseaworthy. In the *Benjamin Noble*, 244 Fed. 95 (6 Cir. 1917), Judge WARRINGTON stated at page 97 with reference to vessels made unseaworthy by improper loading:

> "* * * This is true also of a vessel which is improperly ballasted with reference to the load it carries * * *; so as respects an improper distribution or loading of the cargo * * *; or overloading a particular part of a vessel * * *. It must follow, if it is not obvious that

> the capacity of a vessel and the tonnage of its cargo are likewise vitally related as respects the fact of unseaworthiness. In Cincinnati Firemen's Mutual Ins. Co. v. May, 20 Ohio, 212, 226, Chief Justice Hitchcock said: 'That overloading a vessel renders her unseaworthy, there can be no doubt.' • • • •"

This decision was affirmed in *Capitol Transportation Co.* v. *Cambria Steel Co.*, 249 U. S. 334, 39 S. Ct. 292, 63 L. Ed. 631 (1919). See also *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956) where a longshoreman recovered when injured by improperly stowed cargo while unloading the vessel; *Ballwanz* v. *Isthmian Lines Inc.*, 319 F. 2d 457 (4 Cir. 1963), where a wire sling, while being hoisted, failed to hold a wooden spreader, causing it to fall into a hold; *Gindville* v. *American Hawaiian Steamship Company*, 224 F. 2d 746 (3 Cir. 1955) where a longshoreman was injured while improperly stowed cargo was being unloaded. If a vessel is unseaworthy because a particular part of the vessel is improperly loaded, it logically follows that an improperly loaded draft on the vessel's loading gear creates an unseaworthy condition.

The decision of the Court of Appeals for the Second Circuit is also in conflict with the principle recognized in the decision of the Court of Appeals for the Fourth Circuit in *Scott* v. *Isbrandtsen Co.*, 327 F. 2d 113 (4 Cir. 1964). In that case the Court held that an unseaworthy condition may be created by "the negligence of the longshoremen themselves in the performance of the ship's work and in their method of operation."

Judge BOREMAN wrote at page 123:

> "In the case at bar, there was evidence before the jury that the procedure used by the longshoremen in dis-

charging the cargo was the usual and practical method employed in breaking down and working this type of cargo out of the stow for discharge and was reasonably safe. But there was other evidence to the effect that it took two men to safely handle a bale as it was being rolled down to or toward the cargo net; that because some of the bales were standing on end between the forward bulkhead and beams which extended from port to starboard, there was room for only one man to work; that one man could not handle a bale with safety so as to either check or direct its fall; that *an unsafe and hazardous condition resulted from going to such depth into the stow and creating the stairstep arrangement before undertaking to remove the top tier of the bales standing on end.* Thus, it is apparent that the evidence was in conflict and that different inferences could reasonably be drawn therefrom.

• • •

"In Crumady v. The Joachim Hendrick Fisser, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413 (1959), the Supreme Court, by citing the Grillea case, appears to have given at least tacit approval thereto and to the principle that stevedores themselves could render a ship *pro tanto* unseaworthy and make the vessel owner liable for injuries to one of them.

• • •

"In this circuit it is no longer open to question that evidence of the negligence of the longshoremen themselves in the performance of the ship's work and in *their method of operation* may present a factual issue as to whether an unseaworthy condition is created for which the shipowner may be held liable for injury to a

longshoreman resulting from such condition. This is true even though the condition be transitory and without knowledge of the ship's officers. Furthermore, contrary to defendant's argument, in determining unseaworthiness no significance attaches to the fact that no one complained of the alleged unsafe condition. We point to two fairly recent decisions of this court (and cases cited therein), namely, *Grzybowski* v. *Arrow Barge Co.*, 283 F. 2d 481 (4th Cir. 1960), and *Ballwanz* v. *Isthmian Lines, Inc.*, 319 F. 2d 457 (4th Cir. 1963). These cases were decided subsequent to the decision of the Supreme Court in Mitchell v. Trawler Racer, Inc., supra, 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960), where a transitory slippery condition of the ship's rail was involved and it was held that a factual issue as to unseaworthiness was presented even though the condition was unknown to the ship's officers.

• • •

"In the instant case, because of the trial court's ruling as a matter of law that the plaintiff was free of contributory negligence, no issue in that respect was presented for determination by the trier of fact, but *here there was a conflict in the evidence as to whether the method used in discharging the cargo (the removal of a large number of the bales stowed in the lower tier and the creation of the steep stairstep arrangement up to the topmost tier) created such an unsafe, though transitory, condition as to render the ship unseaworthy.* The Supreme Court has made it abundantly clear that there has evolved a complete divorcement of unseaworthiness liability from concepts of negligence. The plaintiff requested the court to submit to the jury such an issue of fact as to unseaworthiness but, instead, the court instructed that if the jury believed that the longshoremen's method of operation

used in removing the cargo was the sole proximate cause of the accident, the defendant was not liable." (Italics ours.)

In the instant case, the Court of Appeals below, two months after argument, affirmed *per curiam* citing only *Puddu* v. *Royal Netherlands Steamship Company*, 303 F. 2d 752 (2 Cir. 1962) cert. den. 371 U. S. 840, 83 S. Ct. 67, 9 L. Ed. 2d 75 (1962). However, the *Puddu* case turned on the finding that the question of "unseaworthiness" was a factual question. *Puddu* is different from the present case. The issue in this case is a legal issue and was so regarded by the trial judge. He stated with reference to his finding that the ship was not unseaworthy (25a):

"* * * On this point I may say that I do not believe that the cases have as yet reached the point of holding that a vessel is unseaworthy merely because one of its appliances fails when it is used by a stevedore in a manner for which it was not designed or intended. I do not understand that *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423 (1959), relied upon by libellant so holds. In that case, the negligent operation of the stevedore 'did no more than bring into play the unseaworthy condition of the vessel' which had previously existed. Here there was no such previously existing unseaworthy condition."

His finding is based upon the legal concept of unseaworthiness. The petitioner accepts the underlying findings of fact made by the Court but we allege that the legal interpretation of the Court of the concept of "unseaworthiness" and the *Crumady* case is wrong.

The issue presented in this petition involves a basic principle of maritime law which should be resolved by this

Court. In the decision of *Reed* v. *Steamship Yaka*, 373 U. S. 412, 83 S. Ct. 1349, 10 L. Ed. 2d 448 (1963), this Court said:

> "* * * a shipowner's obligation of seaworthiness cannot be shifted about, limited, or escaped by contracts or by the absence of contracts and that the shipowner's obligation is rooted, not in contracts, but in the hazards of the work."

If the loading and winch operation were in the hands of the ship's crew and a crewman was hurt rather than a longshoreman, such crewman could recover for an unseaworthy condition on the vessel even if it was a transitory condition arising out of the operation of the vessel. *Mitchell* v. *Trawler Racer Inc.*, 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960).

In *Oddenes* v. *Universe Tankships, Inc.*, 188 F. Supp. 177 (1960), the plaintiff, a seaman, was injured when an eight-inch spring line slipped out of an open chock and struck him. The trial judge did not find any mechanical defect in the ship's equipment. He did find, however, at page 121:

> "I find that *the manner in which the spring line was rigged created a condition dangerous to* seamen working on the poop deck that this condition rendered the spring line *as rigged* unseaworthy * * *" (Italics ours)

In the *Oddenes* case, it was the manner in which a spring line was rigged which created an unseaworthy condition. Similarly, making up a draft so that it overloads a winch creates the unseaworthy condition.

CONCLUSION

For the above reasons a Writ of Certiorari should be granted as prayed for.

Respectfully submitted,

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Counsel for Libellant-Petitioner.

BAKER, GARBER & CHAZEN,
Proctors for Libellant-Petitioner.

[APPENDICES FOLLOW]

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 175—September Term, 1963.

(Argued November 19, 1963 Decided January 13, 1964.)

Docket No. 28385

ALFONSO SPINELLI,

Libellant-Appellant and Cross-Appellee,

—against—

ISTHMIAN STEAMSHIP COMPANY, a corporation,

Respondent-Petitioner-Appellee and Cross-Appellant,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondent-Impleaded-Appellee and Cross-Appellant.

Before:

MEDINA, WATERMAN and MARSHALL,

Circuit Judges.

Appeal from a final decree of the United States District Court for the Southern District of New York, in Admiralty, Edward C. McLean, *Judge*.

Appendix A

Libellant, a longshoreman, appeals from a final decree dismissing his libel to recover damages for injuries sustained by reason of the falling of a draft of steel pipe in a loading operation and Isthmian Steamship Company cross-appeals from a final decree dismissing its cross-claim against International Terminal Operating Co., Inc. Opinion below not reported. Affirmed in all respects.

BERNARD CHAZEN, Hoboken, New Jersey (Milton Garber and Baker, Garber & Chazen, Hoboken, New Jersey, on the brief), *for libellant-appellant.*

ROBERT P. HART, New York, N. Y. (Ralph C. Kreimer and Kirlin, Campbell & Keating, New York, N. Y., on the brief), *for respondent-petitioner.*

JOSEPH ARTHUR COHEN, New York, N. Y. (Sidney A. Schwartz and Alexander, Ash & Schwartz, New York, N. Y., on the brief), *for respondent-impleaded-appellee.*

PER CURIAM:

Appellant Alfonso Spinelli, a longshoreman, was injured when helping to load cargo aboard the SS Steelmaker, owned by respondent-appellee Isthmian Steamship Company. The libel charges respondent-appellee with responsibility for the fall of a draft of steel pipe that was being hoisted in a sling from the pier to the vessel. The draft fell back because the brake on the ship's winch slipped and libellant-appellant was injured. The evidence ample sus-

tains the finding of the trial judge that the winch was not defective and that the accident happened because the stevedore boss changed from drafts of 6 pipes to a draft of 9 pipes, although warned that such a load was too heavy for the winch. We affirm on the authority of *Puddu* v. *Royal Netherlands Steamship Company*, 2 Cir., 1962, 303 F. 2d 752, cert. denied, 371 U. S. 840.

We affirm the decree in all respects, including the part thereof dismissing the cross-claim of the shipowner against the stevedore, International Terminal Operating Co., Inc., and involved in Isthmian's protective cross-appeal.

APPENDIX B

Judgment

(Filed—January 13, 1964)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of January one thousand nine hundred and sixty-four.

Present:

HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
HON. THURGOOD MARSHALL,
Circuit Judges.

ALFONSO SPINELLI,

Libellant-Appellant,

v.

ISTHMIAN STEAMSHIP COMPANY,

Respondent-Appellant,

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondent-Impleaded-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs to respondent-appellee Isthmian Steamship Company.

A. Daniel Fusaro,
Clerk.